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Supreme Court, U.S.
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No. 96-438

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Joseph P. Boltach, Petitioner
v
Dexter Township, Respondent

Abraham V. Williams, Jr., Petitioner
v
Dexter Township, Respondent

On Petition for a Writ of Certiorari to the
Michigan Court of Appeals

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Jon Luker
Petitioners' Counsel of Record
Post Office Box 970455
Ypsilanti, MI 48197-0808

December, 1996

16 pp

QUESTIONS PRESENTED

1. Does this court have jurisdiction over Petitioners' claim because it was presented when the issue first arose and has been the primary focus of Petitioners' writings since then?

2. Can there ever be an adequate state law ground for refusing to satisfy federal due process requirements?

3. Will Respondent say almost anything to avoid judicial scrutiny of its illegal assessment?

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1. THIS COURT HAS JURISDICTION OVER PETITIONERS' CLAIM BECAUSE IT WAS PRESENTED WHEN THE ISSUE FIRST AROSE AND HAS BEEN THE PRIMARY FOCUS OF PETITIONERS' WRITINGS SINCE THEN.

On April 18, 1989, Respondent Dexter Township adopted an administrative special assessment resolution, Special Assessment Resolution #3 (SAR 3). On May 18, 1989, owners of 18 properties filed petitions in the Michigan Tax Tribunal (MTT) listing several reasons to believe that SAR 3 is unconstitutional and *ultra vires*. Appendix to Application For Writ Of Certiorari (PA) , pp 22a - 35a.

Petitioners asked the MTT to determine whether SAR 3 is authorized by law and supported by evidence. Petitioners' Closing Argument, pp 7 - 9, Const 1963, art 6, § 28, **Marbury** v **Madison**, 5 US (Cranch) 137; 2 LEd 60 (1803), **Alan** v **Wayne Cty**, 388 Mich 210; 200 NW2d 628, 675, 676 (1972). Petitioners

were aware that the Michigan Tax Tribunal Act states:

> "A proceeding before the tribunal shall be original and independent and shall be considered de novo." MCL § 205.735 (1), **Alhi Development Co** v **Orion Twp**, 110 Mich App 764; 314 NW2d 479, 481 (1981).

On the other hand, Respondent asked the MTT to apply an obsolete common law standard of review that begins with an illegal bias. Respondent's Post Hearing Brief, pp 51 - 53.

After the proofs were closed, Respondent asked the MTT to give the standard of review an issue precluding effect. Respondent's Post Hearing Brief, pp 63 - 64. As Respondent requested, the MTT hearing officer decided it could not review claims of fraud, mistake, or abuse of discretion unless Petitioners' economic harm was 2.6 or more times greater than the economic benefit, if any, received via the project. PA p 13a, 16a.

The dollar amount of economic harm and economic benefit are questions of fact which the MTT is required to answer on the basis of evidence. **Dixon Road Group** v **City of Novi**, 426 Mich 390; 395 NW2d 211 (1986) (after

remand for findings of fact), **Kadzban** v **City of Grandville**, 442 Mich 458; 502 NW2d 299 (1993). The Michigan Tax Tribunal Act requires the hearing officer to place findings of fact in an appropriately labeled section of the proposed order and to indicate what evidence, if any, supports those findings. MCL 205.751(1). **Antisdale** v **City of Galesburg**, 420 Mich 265, 277; 362 NW2d 632 (1984).

The hearing officer did not determine economic burden, nor economic benefit, nor the mathematical difference between the two. PA pp 3a - 9a. Instead, the hearing officer presented only a conclusion, which he placed in the "Conclusions of Law" section of the order. PA pp 14a, 15a. Having "concluded" that the presumption was not overcome, the hearing officer affirmed the assessment without analysis of Petitioners' claims of error. PA p 16a.

Ever since then, Petitioners have been dealing with two separate but related federal constitutional claims. The first claim is that SAR 3 violates the due process, equal protection and just compensation clauses of both federal and state constitutions. The second claim is that Petitioners have a federal and state constitutional

right to an unbiased judicial review of each issue necessary to properly decide the first claim. It is this second claim that brings Petitioners to the United States Supreme Court.

In its reply to the Petitioners' application for a writ, Respondent claims that the question presented to the United States Supreme Court was not presented for the first time until after the Michigan Supreme Court denied Petitioners' Application for leave to appeal. Reply, p 10. That statement is false.

Petitioners first raised the issue in their objections to entry of the Michigan Tax Tribunal's proposed judgment. Petitioners not only informed the full tribunal that the hearing officer applied an obsolete standard of review but explained the fundamental federal and state constitutional principles that are codified in the required standard of review. That explanation was then converted to issue number one on Petitioners' appeal of the full tribunal's order. PA p 43a. That explanation was the primary focus of Respondent's unsuccessful motion to affirm. PA p 45a. That explanation was issue number one on Petitioners' application for leave to appeal and on Petitioners' motion for reconsideration. PA pp 47a, 48a.

Of course, the issue was not stated in the exact same words as are found in Petitioners' application, since each court's failure to obey the law changed the circumstances under which the issue arose. No two courts relied on the same excuse for refusing to review the validity of the unconstitutional assessment.

In Supreme Court Practice, 7th ed, p 118, we are instructed as follows:

> "In framing the federal question for presentation to the state court, the litigant is not bound to follow any particular form of words or phrases. It is essential only that he bring the federal claim and the grounds therefor to the state court's attention with fair precision. And 'if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.' **New York ex rel Bryant** v **Zimmerman**, 278 US 63, 67 (1928)."

The "record as a whole" contains repeated references to federal and state cases explaining the federal principles of due process that

Michigan's standard of review requirement is designed to protect.

Petitioners' claims of error relating to the underlying assessment involve questions of fundamental federal law. PA pp 39a - 41a. However, it is not necessary for Petitioners to prove that the case in chief also raises substantial federal questions when jurisdiction is based on Petitioners' federally protected right to a judicial review of those claims.

Because Petitioners have repeatedly presented Michigan courts with a claim that they have an unsatisfied federal and state due process right to a judicial review of each claim of error, the United States Supreme Court has jurisdiction over the question presented in Petitioners' application for a writ. 28 USC § 1257.

2. THERE IS NO ADEQUATE STATE LAW GROUND FOR REFUSING TO SATISFY FEDERAL DUE PROCESS REQUIREMENTS.

As required by US Const, art VI § 2, Michigan's due process guarantee is no less stringent than the federal due process

guarantee. The Fifth Amendment and Michigan's counterpart, Article 1 § 17 use the same words:

> "No person shall .. be deprived of life, liberty, or property, without due process of law...".

Not surprisingly then, Michigan due process cases rely upon federal cases and federal hornbooks for interpretation of Michigan's due process clause. See **Alan** v **Wayne County**, 388 Mich 210; 200 NW2d 628 (1972) for example.

Therefore, if a Michigan court decides that a particular act does not violate the Michigan due process clause when the act does violate the federal due process clause, the decision is erroneous under Michigan law. Const 1963, art 1, § 17, art 6, § 28. US Const, Art VI, § 2, US Const, AM V, XIV.

Decisions that are erroneous under state law are not based on "adequate" state law grounds. As indicated in Petitioners' application, state decisions that violate federal law are not based on "adequate" state law grounds either. US Const, Art VI, § 2, US Const, AM V, XIV.

3. RESPONDENT WILL SAY ALMOST ANYTHING TO AVOID JUDICIAL SCRUTINY OF ITS ASSESSMENT.

Respondent misrepresents the law applicable to the unreviewed issues. For example, Respondent attempts to lure this Honorable Court into thinking that rate making common law controls its decision to use a flat rate assessment, even though the issue is actually controlled by special assessment law. MCL § 123.753, MCL § 41.725, MCL § 124.287. Due to the federal constitutional principles of due process, equal protection and just compensation, Michigan special assessment statutes prohibit a flat rate assessment when the value of the benefit varies. **Crampton** v **Royal Oak**, 362 Mich 503; 108 NW2d 16 (1961). Respondent cannot win this issue if it tells the truth.

Previously, Respondent told the Michigan Court of Appeals that its order was "not clear" on what "issues were waived". Response to Motion for Rehearing, pp 6 - 7. It also told the court that "abandonment" is the wrong reason to ignore the issues, while "abstention" might work if the Court clarifies its order. Response, p 9. The court did

not acknowledge either suggestion. PA p 19a. Respondent now claims that the Michigan Court of Appeals avoided Petitioners' claims on the basis of the abstention doctrine. Reply p 12. Respondent does so to hide the fact that the Michigan Court of Appeals has no explanation nor excuse for not reviewing Petitioners' claim that the MTT applied the wrong standard of review to whatever issues were at issue during the six day hearing.

How much of Respondent's "Counter - Statement of the case" was relevant to the arguments presented in its reply? Isn't it mostly argument, rather than statement? There are few citations to record evidence and a few citations to material outside the record. Respondent does not want this case decided on the applicable law and evidence. Therefore, it will not present a fair and accurate representation of either law or fact.

In short, Respondent's reply is a great example of the type of tactic FRCP Rule 11 was designed to prevent. See also SCR Rule 8.

At the same time, Respondent's arguments raise many questions of law and fact about the validity of the assessment. The answers to those issues do not appear in any

lower court order because Respondent has consistently gone to extremes to avoid having the questions answered. Respondent's tactic has worked because of Michigan's willingness to avoid enforcement of clearly established, federally protected rights, not only in this case, but as an increasingly general rule.

A huge percentage of eligible voters did not vote in November 1996. The longer states avoid their duty to protect citizens from perhaps well meaning but unwarranted illegal government acts, the more reason there is for citizens to not trust any branch of government, and to believe that voting won't matter. Whether or not a candidate is for or against a particular legislative idea won't much matter as long as the courts permit local governments to declare that the law is "irrelevant".

Respectfully Submitted,

Jon Luker
Attorney of Record for Petitioners
PO BOX 970455
Ypsilanti, MI 48197-0808
(313) 572-4774